

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WASHINGTON TOXICS COALITION,)	
et al.	)	CASE NO. C01-132C
)	
Plaintiffs,)	
)	
v.	)	<u>DEFENDANT-INTERVENOR</u>
ENVIRONMENTAL PROTECTION	)	<u>WASHINGTON STATE FARM</u>
AGENCY, et al.	)	<u>BUREAU'S RESPONSE IN</u>
	)	<u>OPPOSITION TO PLAINTIFFS'</u>
Defendants,	)	<u>JULY 15, 2004 EXPEDITED</u>
	)	<u>MOTION</u>
	)	<u>FOR CLARIFICATION</u>
v.)	
)	
AMERICAN CROP PROTECTION)	
ASSOCIATION, et al.)	
	)	NOTED ON MOTION CALENDAR
	)	PER
Intervenor-Defendants.	)	LOCAL RULE 7: JULY 30, 2004

In Plaintiff Washington Toxics Coalition's ("WTC") latest motion, WTC seeks a clarification by this Court as to whether the use of 2,4-D which has been registered under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-

1 136(y) for aquatic application can be applied directly to salmon supporting waters in the
2 State of Washington under the January 22, 2004 Order's exclusion for state-administered
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4 noxious weed programs. The Order's general provision prohibits the ground application
5 of any listed pesticide within 20-yards of salmon supporting waters. January 22, 2004
6 Order, p. 4. However, the Order also contains an exclusion which outlines the following
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8 use restrictions tailored to further the administration of the states' noxious weed
9 programs:

10 *Noxious Weed Programs-*
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12 Use of the Pesticides for control of state-designated noxious weeds as
13 administered by public entities, when such control program implements
14 the following safeguards that NMFS routinely requires for such programs:

- 15 a. Aerial application cannot occur within 100 yards of Salmon
Supporting Waters;
- 16 b. Broadcast spraying cannot occur within 20 yards of Salmon
17 Supporting Waters or when wind speeds are greater than
five miles per hour;
- 18 c. Chemical spraying cannot occur within 15 feet of Salmon
19 Supporting Waters or when wind speeds are greater than
five miles per hour
- 20 d. Only those Pesticides registered by EPA under the Federal
21 Insecticide, Fungicide, and Rodenticide Act ("FIFRA") , 7
U.S.C. §§ 136-136(y), for aquatic application can be used
22 within 15 feet of Salmon Supporting Waters;
- 23 e. Pesticides cannot be used when precipitation is occurring
or is forecast to occur within 24 hours;
- 24 f. All spraying operations must be overseen by a certified
25 applicator; and
- 26 g. For 2,4-D and triclopyr, only the amine formulations of
2,4-D and triclopyr can be used.

1 January 22, 2004 Order, p. 9-10. The issue is whether this exclusion allows the
2 Washington State Department of Ecology (“DEQ”) to apply the amine formulation of
3 2,4-D directly to salmon supporting waters to control the spread of aquatic noxious
4 weeds.
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6 Aquatic plants are an integral component of the aquatic ecosystem, providing
7 shelter, nutrients and shade for a variety of species. See DEQ, Final Supplemental
8 Environmental Impact Statement For Freshwater Aquatic Plant Management, p. viii,
9 (February, 2001), available at:
10 <http://www.ecy.wa.gov/programs/wq/plants/management/aqua028.html> (Relevant
11 portions attached as Exhibit 1 hereto). However, too many rooted and floating plants can
12 degrade an aquatic ecosystem, impairing both fisheries and water quality. Id. Use of
13 aquatic herbicides is also important in controlling the spread of non-native invasive
14 plants which often do not have any natural predators or parasites and which may
15 outcompete the native plants. DEQ, Fact Sheet for Aquatic Noxious Weed Control
16 General NPDES Permit, p. 5 (May 15, 2002) (Relevant portions attached as Exhibit 2
17 hereto). Excessive nutrient loading can also lead to a natural process referred to as
18 eutrophication, resulting in increased plant growth which “literally turn[] lakes into
19 ‘algal bowls.’” Exhibit 1, p. 1. Moreover, control of aquatic noxious weeds is necessary
20 to maintain water intake structures, ease of navigation, and quality recreational
21 opportunities. Id., p. viii.
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1 Washington State DEQ has had a freshwater aquatic noxious weed control
2 program in place for over 20 years. In 1980, the DEQ released an Environmental Impact
3 Statement (“EIS”) to develop statewide guidelines regarding the use of pesticides in the
4 administration of the state’s noxious weed control program. Because the various
5 methods of biological and chemical control have undergone substantial research and
6 development throughout the past 20 years, the DEQ issued a supplemental EIS (“SEIS”)
7 in 1992 and again in 2001, in part to assess the continued use of herbicides applied
8 directly to the waters to control aquatic noxious weeds. See Exhibit 1, p. viii. The 2001
9 SEIS contains a lengthy section specifically addressing the potential effects of 2,4-D in
10 aquatic environments, and also contains a detailed mitigation strategy for the use of the
11 amine formulation of 2,4-D under varying environmental conditions. Id., p. 61-76. The
12 SEIS also incorporates by reference a 433 page risk assessment relative to the use of 2,4-
13 D to control aquatic noxious weeds. Id., Herbicide Risk Assessment for the Aquatic
14 Plant Management FSEIS, Appendix C, Volume 3: 2,4-D, Pub. No. 00-10-043,
15 (February, 2001).¹

16 Pursuant to a Ninth Circuit decision issued on March 12, 2001 in Headwaters, Inc
17 v. Talent Irrigation District, 243 F.3d 526 (9th Cir. 2001), the DEQ then began
18 administering the noxious weed program under the National Pollutant Discharge
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27 ¹ Due to the length of Appendix C, a copy has not been appended to this motion as
28 an Exhibit. However, the contents of Appendix C can be viewed by accessing the following
link: <http://www.ecy.wa.gov/programs/wq/plants/management/aqua028.html>.

1 Elimination System (“NPDES”) permitting requirements of the Clean Water Act
2 (“CWA”). Exhibit 2. The NPDES program is supported by a Lake and River Aquatic
3 Herbicide Monitoring Plan, which outlines the data collection and monitoring
4 requirements in order to evaluate the concentration and environmental persistence of the
5 pesticides’ active ingredients approved for aquatic use. DEQ, Annual Group Monitoring
6 Plan for Lake and River Aquatic Herbicide Applications Performed Under the Noxious
7 Weed National Pollutant Elimination System Discharge (NPDES) Permit, (May, 2003)
8 (Attached as Exhibit 3 hereto).

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12 WTC’s Motion for Clarification serves to underscore the very argument that
13 Defendant-Intervenor Washington State Farm Bureau (“WSFB”) has raised since the
14 Order was first issued. In its attempt to craft one standard Order to cover all of the
15 various active ingredients for all potential uses under all environmental conditions, the
16 Order fails to provide sufficient guidance to those individuals responsible in a practical
17 sense for carrying out the terms of the Order under site-specific conditions. While the
18 Order was broadly-worded with the goal of conserving the salmonid species, other
19 important state interests such as the control of invasive aquatic weeds to maintain water
20 intake structures and to provide high-quality recreational or aesthetic opportunities were
21 given little to no consideration.

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25 This Court carefully constrained its analysis during the limited evidentiary
26 hearing to the appropriate size of the buffer zones, rather than the need for the buffer
27 zones. See Dkt Nos. 159, 186. In assuming that the section 7 procedural violation
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1 mandated the injunctive order, this Court failed to discuss any countervailing
2 considerations which would flow from the Order and could impair the ability of
3 individuals or entities to further conserve or enhance the listed salmonid species or its
4 habitat. For example, in WSFB's Motion for Reconsideration, several individual
5 landowners stated that the Order will negatively impact their ability to continue investing
6 in low-pressure water delivery systems and streambank enhancement projects. Dkt No.
7 252, p. 29-30. WTC claimed these "assertions border on fantasy," and failed to directly
8 respond to these allegations. Dkt. No. 287, p. 39-40. Likewise, this Court apparently
9 found the allegations unpersuasive as the assertions garnered no direct response. Rather,
10 this Court restated that "injunctive relief is an appropriate remedy for violation of the
11 ESA in absence of 'rare or unusual circumstances such as interference with a long-term
12 contractual relationship' or 'irreparable harm *to the environment*.'" Dkt No. 295, May 18,
13 2004 Order, p. 7, quoting Sierra Club v. Marsh, 816 F.2d 1376, 1384 n. 11 (9th Cir. 1987)
14 (emphasis in the original).

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16 Now, in WTC's zealous pursuit of its goal to eliminate the use of all pesticides to
17 purportedly save the salmonid species, WTC and this Court has failed to address how the
18 elimination of the aquatic use of 2,4-D to control invasive exotic weeds may negatively
19 impact the survival of the salmonid species or its habitat. While reducing 2,4-D use
20 around salmon supporting streams may have a beneficial effect on the overall survival of
21 the salmonid species, there has been absolutely no discussion whether discontinuing the
22 aquatic use of 2,4-D may indirectly and negatively impact the salmonid species by
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1 allowing invasive plants to alter the native environment. In other words, this Court has
2 failed to address how the elimination of pesticides in several instances, such as the use of
3 pesticides to control aquatic weeds, may result in irreparable harm to the salmonids'
4 aquatic environment. These important and countervailing considerations must be
5 considered if the Order is to achieve its goal of furthering the conservation of the
6 salmonid species. Until such time as these considerations are addressed, the Order
7 cannot be considered "narrowly tailored to remedy the specific harms shown by plaintiffs
8" Zepada v. United States, 753 F.2d 719, 728 n. 1, (9th Cir. 1985).

12 Furthermore, Plaintiffs' Motion for Clarification also underscores the overall
13 confusion that has been generated by the broadly-worded Order. Again, WSFB
14 specifically noted in its Motion for Reconsideration that individual landowners
15 responsible in a practical effect for carrying out the terms of this Order have been unable
16 to understand and apply the terms of the Order using the StreamNet database. Dkt No.
17 252 p. 6-13, Dkt No. 291, p. 5-10. WTC dismissed these claims of vagueness, citing the
18 wealth of detailed information either contained within the Order or referred to as an
19 outside source of information by the Order for individuals to wade through as evidence of
20 the Order's exhaustive clarity. Dkt No. 287 , p. 44-47. Yet only months later, WTC is
21 now the party coming forward complaining of the Order's inconsistent and/or confusing
22 language. Note also that, unlike the WSFB, declarants who claim confusion over an
23 Order that was issued in a case in which the declarants had absolutely no prior notice or
24 connection, this request for clarification was lodged by the same party who was

1 intimately involved in drafting the language of the final Order. In other words, WTC has
2 asked this Court to disregard the concerns of individual third parties who may be
3 criminally or civilly liable for violating the vague terms of the Order while, almost
4 simultaneously, asking the Court to clarify a confusing portion of the Order which WTC
5 itself helped draft. Accordingly, this Court should review the Order starting from the
6 premise that even Plaintiffs' question the application of certain blanket provisions listed
7 in the Order, and should further review the entire Order in a practical sense to ensure its
8 terms can be clearly understood by the average individual landowner.
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12 For the aforementioned reasons, WSFB opposes WTC's limited Motion for
13 Clarification on the basis that there has been no discussion as to any countervailing
14 considerations regarding the use of pesticides, the discontinuance of which may
15 irreparably harm the aquatic environment upon which the salmonid species relies for its
16 survival. Furthermore, based on WTC's own motion, WSFB again raises its general
17 objection to the overall vagueness and confusion engendered by this Order, and requests
18 the entire Order be reviewed for both consistency and clarity.
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1 RESPECTFULLY SUBMITTED this 21st day of July, 2004.
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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2004, I electronically filed Washington State Farm Bureau and Washington State Potato Commission's Request for Reconsideration with the Clerk of the Court using CM/ECF system, which will send notification of such filing to the following:

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